IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 911 OF 2004

Mrs. Shobhna @ Shobhana @ Shobha Dilip Gudka.
....Petitioner.

Mr. S.K. Jain for the Petitioner.

Mr.D.D. Madan i/by C. Ardeshiv i/by Gagrat & Co. for the Respondent.

CORAM : A.M. KHANWILKAR, J.
DATED : 24/6/2005

P.C.:

1. Heard counsel for the parties. Perused the pleadings.

2. Essentially the case of the petitioner before this court is that the respondent company has failed to discharge its obligation to provide family bonds which would give return on maturity in the sum of Rs.75/- lacs. The said offer was made by the respondent company to persuade the petitioner to purchase the residential flat in the building constructed by the respondent company. Indeed, from the documents which are placed on record, it is seen that the company in its communication dated 2.2.1999

has clearly confirmed the position that the company shall arrange from the reputed financial institutions bonds encashable at the end of 28 years for four times the entire value at the time of booking of the apartment which will be issued free of costs. However, with the passage of time, it appears that, procuring of such bonds was not feasible for more than one reason and those reasons are mentioned in the letter sent by the respondent company to the petitioner dated 21.6.2000 as well as 26.8.2000 at Exh. A and B to the reply affidavit. The petitioner was called upon to exercise option as pointed out in the said letters. From the letter at Exh-A to the company petition dated 12.1.2001, it is once again clear that the respondent company expressed its inability to procure such bonds for and on behalf of the petitioner. The respondent company in turn, out of good gesture, provided for discount towards the bonds in the sum of Rs.1,60,444/- as can be seen from the statement of account furnished at Page No.21 of the compilation. It is seen that the agreement which has been finally executed between the parties, being agreement of sale in respect of the flat purchased by the petitioner under reference, makes no reference to the the liability of the respondent company to

procure such bonds; and it is the case of the respondent company that amount referred to in the agreement is arrived after giving adjustment in terms of the Schedule at Page 21 of the compilation.

3. To get over this position, the petitioner has relied on the letter issued by the Manager-Sales of the respondent company purported to be dated 25.10.2001. Even if the case of the petitioner is to be accepted that the respondent company had promised to provide the concerned family bonds, that by itself is not admission of liability, but at the most would amount to failure to keep the promise which was given to the petitioner at the threshold to persuade the petitioner to purchase the residential flat in the building constructed by the respondent company. In the said letter, it is assured that the respondent company will ensure to procure the concerned family bonds within three months, failing which company would be liable to pay sum of Rs.25,000/-per month as penalty towards the non issuance of bonds. Relying on this commitment in the letter, it is strenuously contended that this amounts to admission of liability of the respondent company and since that amount has not been paid in spite of the statutory notice, it can be safely held

that the respondent company is unable to pay its debt. However, this letter has been disputed by the respondent company for variety of reasons mentioned in the reply affidavit. It is not necessary for this court to go into the issues pressed by the rival parties in connection with the genuineness of this letter. Suffice it to observe that, the contentions raised on behalf of the petitioner are disputed and triable issues as would arise for consideration, which cannot be gone into in the present proceeding which is under Section 433 and 434 of the Companies Act,1956. The grievance of the petitioner can be agitated before some other forum and as rightly contended by the respondent company, it was open to the petitioner to take recourse to remedy of specific performance. Whereas, if it is the case
of breach of trust or cheating, it was open to the petitioner to take recourse to such other remedy as was permissible in law.

4. In my opinion, from the pleadings and documents on record, it is not possible for this court to come to a definite finding that the respondent company has acknowledged its debt as contended by the petitioner. If it is so, there is no question of

entertaining this petition in terms of Section 433 that the company is unable to pay its debt.

5. There is also substance in the preliminary objection raised on behalf of the respondent company that the petition as filed is not maintainable because it has been filed on the basis of power of attorney which does not provide any express authority to take recourse to remedy of winding of company under the provisions of the Companies Act. This submission is made good on the basis of the clause 6 of the power of attorney. Reliance is rightly placed on the decision of our High Court in the case of **Shantilal Khushaldas and Bros. Pvt. Ltd. Vs. Smt. Chandanbala S. Shah and another reported in 1993 Vol.77 Page 2534** to support this contention. Even for this reason, petition ought to fail. Accordingly, petition is dismissed.

6. It is made clear that this order is not an expression of opinion on the merits of the assertions of the respective parties, which they may pursue before the appropriate forum, as may be advised.

7. Office to return all the original documents

submitted by the petitioner in support of this petition.

(A.M.KHANWILKAR,J.)